Ethics of Class Counsel:

Is there a need for restrictions on investigating class claims?

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Introduction

Class actions are a unique procedural mechanism that facilitate access to justice, judicial economy, and behaviour modification. Without the use of this procedural method, many societal wrongs would not be addressed. Recently, class action lawsuits appear to be an increasingly pervasive force, particularly in the realm of product liability and securities transactions.[1] The prevalence of class action litigation has compelled observers to focus on addressing the reasons behind such an increase, suggesting that class counsel are creating claims, or 'stirring up litigation' to foster their own financial means.[2]

Over 25 years ago the Ontario Law Reform Commission's *Report on Class Actions* recognized the unique ethical concerns that arise from the class action procedure, noting, "difficult questions may arise from an attempt to integrate a new class action procedure with existing legal canons of legal ethics…".[3] There has been recent academic discussion on the necessary reform of the existing Rules of Professional Conduct to adapt the contexts of class action procedure, with specific regard to conflicts of interest, the adversarial void and absent client predicament.[4] In spite of this, little has been discussed on the subject of the ethics of class counsel prior to commencing the class action itself. The distinctive nature of class action procedure offers a significant divergence from the traditional litigation proceeding, including the

[1] Luis Millan, "Consumers winning class action clout" *The Lawyers Weekly* (In-House Counsel Series – Summer 2011), online: Osler <http://www.osler.com/newsresources/Details.aspx?id=3624>.

[2] F. Paul Morrison & H. Michael Rosenberg, "Missing in Action: An Analysis of Plaintiff Participation in Canadian Class Actions" (2011) 53 SCLR (2d) 97 at 97 [Morrison].

[3] Ontario Law Reform Commission, *Report on Class Actions* (Ontario: 1982) at 201 [OLRC Report].

[4] Michael Carabash, "Ethical Conduct for Class Counsel in Ontario" (2006) 3 Can Class Action Rev 617; Jasminka Kalajdzic, "Self-Interest, Public Interest and the Interests of the Absent Client: Legal Ethics and Class Action Praxis" .(2011) 49 Osgoode Hall LJ 1; Paul Perell, "Class Proceedings and Lawyers' Conflicts of Interest" (2009) 35 Adv Quarterly 202.

ways in which clients become involved in the process. This paper will focus on the unique role that class counsel play in the initial stages of a class proceeding, and will discuss the ethical and social implications that flow from this role by addressing the current legislation, jurisprudence and the rules guiding professional and ethical conduct in the lawyering process.

The Entrepreneurial Lawyer

Class proceedings are distinguishable from the standard litigation proceeding by way of the manner in which a client retains the lawyer. Typically in civil actions, the initiation of a claim occurs when a client perceives an issue and seeks the advice of a lawyer who determines whether the issue is actionable. The same sequence of events occurs in class proceedings, however, more often than not, counsel commence a class action after the recognition of a meritorious claim without having an initial client bring the issue to their attention.[5] Frequently the identification of actionable issues is through current events that are in the media's focus. Class counsel will then solicit or "troll" for an appropriate representative plaintiff in order to commence the claim.[6] To do this, class action lawyers will often resort to publicly advertising the investigation of a potential claim with a specific company or companies, and ask those with information to come forward.

It is not surprising that the nature of how class actions typically arise attracts the designation of 'entrepreneurial lawyering'. Defence counsel frequently imply that plaintiff lawyers initiate claims for personal financial gain, and as such, have an enormous amount at stake

[5] Lisa C. Munro, "Who can be a representative plaintiff under Ontario's Class Proceedings Act, 1992?" *Lerners LLP* (9 September 2004), online: Lerners LLP < www.lerners.ca/content/documents/who_can_be.pdf>.

[6] *Ibid*.

personally in the particular action. It is commonly understood that if class counsel land on a "goldmine" claim, the kick back in legal fees will be significant. In an ordinary proceeding, the client has a predominate interest in the outcome and consequently, he or she also bears the risks associated with losing the action. Contrastingly, class action lawyers have a considerable stake in the outcome of the case when taking into account the upfront expenses of disbursement, fees, and time that must be invested. This stark comparison is also broadened in situations where the law firm acting for the representative plaintiff has agreed at the outset to indemnify his or her exposure to costs.[7]

Despite this suggestion, it has been judicially accepted that notwithstanding the fact that a lawyer may have a greater financial risk than the representative plaintiff, the lawyer of record is not a *de facto* plaintiff.[8] In fact, the Courts have recognized that the potential for "extremely lucrative" class counsel fees can be described as "the engine that drives" class proceedings.[9] Further, as expressed by Justice Perell in *Fantl v Transamercia*, *"*the entrepreneurial nature of a class proceeding can be a good thing because it may be the vehicle for access to justice, judicial economy, and behaviour modification, which are all the driving policy goals of the *Class Proceedings Act, 1992*".[10] This suggests a recognition that lawyer-initiated class actions are the norm for these types of proceedings.

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[7] *Fantl v Transamerica* (2008) OJ No. 1536 at paras 49,52, 60 CPC (6th) 326 (SCJ) [*Fantl*].

[8] Paul Perell, "Class Proceedings and Lawyers' Conflicts of Interest" (2009) 35 Adv Quarterly; *Caputo v Imperical Tobacco* (2005), 74 OR (3d) 728 at paras 41-42, 250 DLR (4th) 756, 9 CPC (6th) 175 (SCJ).

[9] *Fantl*, *supra* note 10; Luis Millan, "Class actions – legal fees in the spotlight" *The Lawyers Weekly* (12 August 2011), online: The Lawyers Weekly < www.lawyersweekly-digital.com/lawyersweekly/3113?pg=4>.

[10] *Fantl, supra* note 7 at para 53.

On the same token, it cannot be underestimated that the risks associated with launching class actions are tangible and may act as a barrier for counsel to take on such claims. Class proceedings have long been considered “bet the firm” endeavours.[11] Contingency fee arrangements, which are provided for under the *Class Proceedings Act, 1992*,[12] shift the burden of funding the legal proceeding from the plaintiff to the lawyer. Class counsel often compete against governments and large corporations that can afford to retain top defense counsel. The defendants’ lawyers are typically paid handsomely throughout the entirety of the litigation, while class counsel do not see payment for years, and bear the risk of never recouping fees and time spent on preparing the case.[13] This is a risk that many lawyers are not willing to take considering that the average litigation costs for a class action can run in the hundreds of thousands of dollars. The potential that these costs may never be recovered, combined with the tremendous amount of time that is required to manage the class proceeding itself, results in many lawyers refusing to take on such claims.

The Social Purpose of Class Proceedings

It can be said that without courageous class action lawyers who are willing to take these risks, many meritorious claims would not be brought forward and access to justice would not be served. Drawing on the policy objectives of the *CPA*, “the viability of class actions rests on the willingness of lawyers to take on group claims that individually would be uneconomical to

[11] Won J. Kim, “Class action II: The rebuttal – no ‘bet-the-farm’ judgments in Canada” *The Globe and Mail* (23 November 2005), online: The Globe and Mail < http://www.investorvoice.ca/PI/2438.htm>; Also see *Authorson v Attorney General of Canada*, 2003 SCC 39, [2003] 2 SCR 40 (where the Supreme Court of Canada overturned the trial and appeal decisions that found that the Government improperly used the funds of disabled veterans after returning from World War II. In this action, class counsel received very little for their time and ultimately resulted in the dissolution of the firm).

[12] SO 1992, c 6, s 32 [*CPA*].

[13] Won J. Kim, “Class action II: The rebuttal – no ‘bet-the-farm’ judgments in Canada” *The Globe and Mail* (23 November 2005), online: The Globe and Mail < http://www.investorvoice.ca/PI/2438.htm>.

prosecute".[14] Often the individual quantum of the class members' claims is remote, therefore making the economic feasibility of launching an action not worthwhile. However, when multiple claims are aggregated, access to justice is promoted for those individuals who have been affected by spreading the costs of complex litigation among the class members, while respecting judicial economy by avoiding the need to have multiple actions determine the same issue.[15] The Honourable Justice Iacobucci asserts, "class actions can facilitate the substantive element of access to justice because the class as a whole is stronger than individual claimants when facing a defendant with considerable resources to defend itself".[16]

Class actions have been described as being "more than just legal, they are dynamic political and social creatures, and the players within the class action forum often become public figures debating what is seen as good and evil".[17] This form of litigation serves as a means of effecting behaviour modification, both in terms of specific deterrence and general deterrence. Specifically, the defendant in the proceeding is held liable for their actions, and generally, a message is sent to potential wrongdoers that this type of conduct will not be tolerated, judicially and by society at large. When the conduct of the defendant(s) is particularly egregious or impacts a large number of individuals, the public becomes involved through media attention. For this reason, class actions can be considered real-time litigation because the conduct of the defendants

[14] Jasminka Kalajdzic, "Self-Interest, Public Interest and the Interests of the Absent Client: Legal Ethics and Class Action Praxis" (2011) 49 Osgoode Hall LJ 1 at 6 [Kalajdzic].

[15] See *Cassano v The Toronto-Dominion Bank* (2007) ONCA 781.

[16] The Hon. Frank Iacobucci, "What Is Access to Justice in the Context of Class Actions?" (2011), 53 SCLR (2d) 17 at 21.

[17] Kent Glowinski, "Winning Through Analogy: The Strategic Use of the Representative Plaintiff" (2004) 1 Can Class Action Rev 401 at 401.

who engaged in the wrongdoing can be altered, particularly when the defendant is being shamed publicly.

To mitigate the risks associated with launching a class action, class counsel need to fully understand and assess the claim and its risks prior to commencing the proceeding. This is not only to gauge the amount of time and money that will be required to front the litigation, but to understand what information and documentation is necessary to move the lawsuit forward in light of the strict legislative requirements. For instance, in Ontario there is a high bar to be met in order to attain certification of the class. As prescribed by the *CPA*, the following requirements must be met before certification can be granted: there must be a valid cause of action, an identifiable class, the claims of the class members must raise common issues, it must be demonstrated that a class proceeding is the preferable procedure, and there must be an adequate representative plaintiff.[18]

In order to assess the merits of the claim and the risks going forward, class counsel must ascertain the reasonable extent of the class and be able to consult with putative class members to garner the appropriate information before pooling resources and commencing an action. The most logical and cost-effective method of doing so is to address the public at large by announcing an inquiry into a specific company or product and have the members of the public come forward with the relevant information.

[18] *CPA*, *supra* note 12, s 5(1).

Ethics of Class Counsel in Initial Stages

Recently, there has been discussion regarding the need for ethical restraints on class counsel during the investigative process of a potential class proceeding.[19] It has been suggested that "recruitment of plaintiffs for class actions has gone overboard", whereby class counsel routinely announce investigations of public companies prior to even commencing a claim.[20] When an investigation is broadcasted to the world, there is the connotation that the company has engaged in wrongdoings. This in turn calls the public image of the company into question. Often, this has a serious and significant potential impact on the share price of that company at the expense of an investigation. This is predominantly the case when the potential class action involves securities transactions. What is of particular importance is that this influence occurs *prior* to commencement of a legal action against that company.

There are currently no specific rules under the Law Society of Upper Canada (LSUC) *Rules of Professional Conduct* or the Canadian Bar Association (CBA) *Code of Professional Conduct* that preclude a lawyer from advertising potential claims in such a fashion.[21] However, there is a general rule that forbids lawyers from conducting themselves in ways that bring the practice into disrepute.[22] What is of particular issue for defence counsel in these circumstances is the fact that the lawyer is making statements about a particular company, often times before a

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[19] Luis Millan, "Why class actions create ethical minefields" *The Lawyers Weekly* (19 August 2011), online: The Lawyers Weekly < www.lawyersweekly-digital.com/lawyersweekly/3114?pg=4> [Millan].

[20] *Ibid*.

[21] The Law Society of Upper Canada, *Rules of Professional Conduct*, Toronto: The Law Society of Upper Canada, 2011 [LSUC *Rules of Professional Conduct*]; The Canadian Bar Association, *Code of Professional Conduct*, Ottawa: CBA, 2006 [CBA *Code of Professional Conduct*].

[22] Millan, *supra* note 19.

client has provided instructions to act on their behalf. Class counsel are unilaterally soliciting potential wrongs without the foundational basis of a lawyer-client relationship.

The investigative process employed by class action lawyers may be viewed by some as a mere 'fishing expedition' on the part of a zealous entrepreneurial lawyer looking to forward their own personal financial interests. Although there are no restrictions on the use of public announcements for the furthering of a potential class action, there is a risk that the company targeted in the investigation may be unduly subjected to negative public attention that can cause serious and substantial harm to the viability of their business.

Commonly, the profession defers to the Courts to marshal the behaviour of both plaintiff counsel and defence counsel throughout a class proceeding.[23] One of the unique aspects of class action procedure that differs from regular litigation is that once counsel elects to advance the claim under the *CPA*, the action is governed by the jurisdiction of the Court. The formative steps within the proceeding must be reviewed and approved by the Court before any disposition can be effected. Case law has recognized that the Court has an inherent jurisdiction to control proceedings in class actions independent of the Court's jurisdiction under section 12 of the *CPA*,[24] which provides that "[t]he Court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it

[23] See *Epstein v. First Marathon* [2000] OJ No 452 (On. Sup. Ct. Jus.) [*Epstein*], (where the Court admonished counsel for abuse of the class action process).

[24] *CPA*, *supra* note 12, s 12.

considers appropriate".[25] In *Fantl*, Justice Perell remarked that certification is not a prerequisite for this inherent jurisdiction, and that the Court has jurisdiction to protect putative class members as potential parties to the litigation from the outset of the action being commenced.[26]

However, what needs to be considered is that the initial stages of an investigation by class counsel is an exceptional point in the process of the proceeding. At this juncture, the action has yet to be filed and is thus not under the Court's supervision. Often times there is no client to report to and consequently, it is only the class action lawyer perpetuating the investigation. The notional defendant only discovers that their company may be a potential defendant in a class proceeding after the so-to-speak 'damage' to the company's public image has already been endured.

This calls into question the role that class counsel play in the overall process of commencing potential class proceedings. It appears that if viewed in this light, class action lawyers are taking on a policing and prosecutorial role, protecting society from the corporate machine, with the potential for a big personal pay out at the end. Brad Dixon, a respected class action defence lawyer remarks that "class counsel at the end of the day are lawyers acting as advocates, not a regulators or judges."[27] It is recognized that lawyers have an important societal role to play in advancing the interests of their clients, however, in this context, counsel are making public announcements even before having a client instruct the commencement of an

[25] *Fantl*, *supra* note 7 at para 57.

[26] *Fantl*, *supra* note 7 at para 58; See also *Fenn v Ontario*, [2004] OJ No. 2736 (SupCtJus) at paras 13-17.

[27] Email Letter from Brad Dixon, partner at BLG Vancouver, to [student name removed] (29 September 2011) regarding Mr. Dixon's quote in *The Lawyers Weekly* article entitled "Why class actions create ethical minefields".

action.[28] The defence-sided position is that although it would be unrealistic to wait for the perfect client to walk through the door, restraints should be placed on the publication of mass media "investigations".[29]

In keeping with this line of thought, there has been a recent discussion on the question of what social purpose class actions truly have in society. Some class action defence counsel are of the opinion that class proceedings do not truly foster access to justice. This conclusion has been drawn when considering the fact that class members with minimal claims would not typically go forward with litigation, but for the thrust of entrepreneurial class counsel.[30] It has been proposed that class actions can only be justified as being in the best interest of the public and resolving the issue of access to justice where the claimants actually want to litigate.[31] In a recent publication, Morrison and Rosenberg suggest, "behaviour modification may provide a secondary rationale for class actions, but access to justice must remain the principal object of any class proceeding".[32] On analysis, the authors conclude that the low take-up rates on class action settlements demonstrate that the majority of class members do not wish to participate in facilitating the litigation. It is further proposed that class actions commenced on behalf of persons who do not wish to pursue the litigation puts undesirable strain on judicial resources, and is therefore not furthering the objectives of the *CPA* altogether.[33]

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[28] *Ibid*.

[29] *Ibid*.

[30] Morrison, *supra* note 2 at 97.

[31] *Ibid*.

[32] *Ibid* at 97-98.

[33] *Ibid* at 105.

In spite of this position, the case law does not suggest that one policy goal of the *CPA* should prevail over the other. Each and every case depends on its own facts and circumstances. The unique factors of a particular action will dictate what policy objective is predominant in that case. When viewing the policy objectives in the backdrop of assessing certification, judges should not look to only one particular factor in weighing the criteria. As Justice Rosenberg stated in *Markson v MBNA Bank*, "the inquiry into the question of judicial economy, access to justice and behaviour modification can only be answered by considering the context, the other available procedures and, in short, whether the class proceeding is a fair, efficient and manageable method of advancing the claim".[34]

What is the Role of the Advocate?

Taking a step back to critically evaluate these ideas, one could ultimately conclude that when assessing whether class actions fulfill the policy objectives of the *CPA*, the answer lies in one's individual understanding of the role litigation plays in society. Litigation can have an influence on a holistic front, which impacts on the grander scheme of social order, or it can be narrowly construed to the particular proceeding at hand.

Some advocates suggest that it is "entirely appropriate" in today's economy for lawyers to play an educative role in alerting the public when their rights have been violated, and that it should, in fact, be encouraged.[35] Notably, plaintiff counsel David Klein remarks, "we often look to the criminal justice system to impart positive social change, however, what is sometimes overlooked is the impact the civil justice system has as a tool in creating positive societal change

[34] *Markson v MBNA Bank*, [2007] OJ No. 1684, 2007 ONCA 334 at 70.

[35] Millan, *supra* note 19.

as well".[36] Klein, in discussing public communications made by class counsel, notes that there is a certain irony at play, considering that these statements are a form of communication in and of themselves, informing the public of their rights and that their rights have potentially been infringed upon.[37]

At the very least, from a policy perspective, a defendant should not be entitled to benefit from their own wrongdoing and further be unjustly enriched at the expense of an innocent party, who may not realize their rights in a particular claim. This is a basic tenant of the laws of equity. The recognition that lawyers do have a role to play in the administration of justice has been provided for under both the LSUC *Rules of Professional Conduct* and the CBA *Code of Professional Conduct*.[38] The commentary in both codes states that this duty is not restricted to the lawyer's professional activities. As outlined, "the lawyer's responsibilities are greater than those of a private citizens" and that the lawyer "should not hesitate to speak out against an injustice".[39] Lawyers have a heightened role to play in society generally, independent of whether acting specifically for a client who has retained their services. With this view, class counsel, in initiating claims, are fulfilling the basic obligations of advocacy lawyering.

Critics suggest that the role of correcting moral wrongs should be left to the regulating bodies, and are not the work of entrepreneurial lawyers.[40] This may be true in some

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[36] Phone interview with David Klein (19 January 2012) with [student name removed].

[37] *Ibid*.

[38] LSUC *Rules of Professional Conduct*, *supra* note 27 at Rule 4.06, commentary; CBA *Code of Professional Conduct*, *supra* note 27 at ch XIII, commentary 3.

[39] *Ibid*.

[40] Morrison, *supra* note 2 at 97.

circumstances, however, that does not negate the reality that the ones who have been wronged have the legal right to take action and hold the defendant(s) accountable for their misconduct. Relying on regulating bodies allows for future modification of behaviour, but does not provide compensation for those who have already been affected by the actions of the wrongdoer. In any event, most governmental bodies do not have the proper legislation or resources in place to pursue the regulation of every facet that class actions cover.[41] Citizens are dependent on plaintiff lawyers to fill that gap. Although there is self-interest that is involved on the part of counsel, lawyers are well trained to separate their own interest and the interests of the client.[42]

The judiciary is fully aware of the entrepreneurial nature of class actions and has recognized that absent those lawyers willing to seek out and act on such wrongs, these injustices in society would be unremedied and unaddressed. As Winkler J., as he then was, noted about the *CPA*,

> [t]his legislation does not envisage that causes of action, legitimate though they may be, will be identified and class members recruited, for the ultimate financial gain of the organizers. Instead, the legislation anticipates a genuine representative plaintiff. The purpose of the legislation is to facilitate the litigation of causes of action and not to generate them for financial gain.[43]

The Courts further recognize that there is the need to level the playing field between society and the big corporations, and currently that role is with class action lawyering. As articulated by Justice Perell in *Fantl*,

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[41] *Supra* note 36.

[42] *Ibid*.

[43] *Smith v. Canadian Tire Acceptance Limited* (1995), 22 OR (3d) 433 at para 63, aff'd 26 OR (3d) 94 (C.A.).

> [t]he presence of a genuine claimant reduces frivolous claims, acts as a check and balance to the excesses of entrepreneurial law firms, provides a voice to protect the interests of the absent class members, and goes some distance to ensuring that the access to justice and behaviour modification provided by the Act make a meaningful contribution to both private and social good.[44]

The Courts have demonstrated use of this "check and balance" to ensure that frivolous claims are not brought forward. This was exhibited in *Chartrand v. General Motors*, where Justice Martinson refused certification of the class, concluding that Chartrand was inadequate to act as the representative plaintiff because it was evident she was recruited by class counsel due to her passive role in the proceeding.[45] This illustrates that the Courts are not only alive to the protection of claimants, but defendants as well. That being said, it is generally understood that class counsel will more often than not, seek out a representative plaintiff. Strathy J. noted, "I agree that recruitment of the class representative is not fatal. After all, not many people wake up in the morning and decide that they want to start a class action. They may well need the encouragement of experienced counsel to take up the cudgels and put their name to a worthy cause".[46]

The American Perspective

In contrast to Canadian jurisprudence, the American judicial system has been characterized by the excessive use of class action lawsuits by opportunistic lawyers. As has been acknowledged in Canadian academia, American legal scholars have long recognized the need for

[44] *Fantl*, *supra* note 7 at para 63.

[45] *Chartrand v General Motors Corp*., 2008 BCSC 1781 at para 78.

[46] *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 at para 222. Also see *Re*Collections Inc. v. Toronto-Dominion Bank* 2010 ONSC 6560 at para 204.

reform of the current rules of professional conduct to fit in line with the unique nature of class proceedings.[47]

Often we defer to our American counterparts as a comparator to determine how similar issues are resolved. Although there are significant similarities between the American and Canadian class action models, one must take caution when drawing inferences between the two jurisdictions. There are distinct differences in the manner of class action lawyering between Canada and the United States that must be taken into consideration. For example, in the United States the courts are rampantly flooded with 'strike-suits' or what has been phrased as 'litigation blackmail', which are effectively frivolous actions commenced for the purpose of attaining a private settlement. The goal of plaintiff counsel is to induce settlement before going to court, knowing that settlement would be more cost effective for the defendant than proceeding to court.[48]

This type of behaviour and abuse of the class action process is not typically observed in Canada. There has only been one reported instance of a strike suit in Canada since the implementation of class proceedings legislation.[49] The explanation for this could be due, in part, to the fact that in Canada there is an independent class action bar with a specialized judiciary that presides over all class proceedings. As part of the lawyering process, reputation is one of the most important aspects to being a respected and effective advocate. There is the recognition that

[47] Kalajdzic, *supra* note 14 at 26.

[48] Jack A, Raisner, Ryan A. Hagerty & Lee Schreter, (*"American Bar Association Section of Labour and Employment Conference - Ethical Issues"* delivered at the Federal Labour Standards Legislation Committee, Puerto Vallarta, Mexico, 23-25 February 2011), [www2.americanbar.org/...2011-midwinter-meeting/.../i_ethics.pdf] [ABA Ethics Review].

[49] *Epstein*, *supra* note 23.

in a small class action bar, that reputation can easily be tarnished. For this reason, the temptation to engage in this conduct is minimized. Conversely, in the United States, there is no specialized judiciary to preside over class actions, and many attorneys will dabble in initiating class actions without actually specializing in that area of practice. These factors are important to consider when drawing inferences and using American practices as a reference of comparison to Canadian practices.

Currently in the United States there is a prohibition on barratry, which is the active solicitation of clients by counsel prior to commencing an action and prior to certification as prescribed by the American Bar Association *Model Rules of Professional Conduct*.[50] The purpose for this prohibition is rooted in the public policy argument that in-person contact or real-time electronic contact with putative members of the class when there is a potential pecuniary gain for the lawyer fosters undue influence, intimidation and potential for abuse. The United States Supreme Court confirmed this principle when noting that the solicitation of clients by attorneys has long been viewed as inconsistent with the ideals of the legal profession, and often facilitates the 'stirring up of litigation'.[51]

However, the ban is restricted to in-person contact by a lawyer specifically. Where nonprofit interest groups are advancing political concerns or legitimate rights of the association, solicitation of class members is permitted.[52] The policy reason for this allowance is rooted in the belief that nonprofit organizations will provide the protection and regulation from coercion that is

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[50] The American Bar Assocation, *Model Rules of Professional Conduct*, Chicago: ABA, 2010, Rule 7.3 [ABA *Model Rules of Professional Conduct*].

[51] *Ohralik v Ohio State Bar Association*, 436 U.S. 447 (1978) at 454.

[52] ABA *Model Rules of Professional Conduct*, *supra* note 50 at Rule 7.3.

in the interest of the state.[53] The ban on solicitation by class counsel poses significant problems at the initiating stages of an action. If counsel are not able to discuss the potential claim with putative class members, it is difficult to assess the risks associated with going forward with the litigation. Plaintiff counsel have repeatedly called for reform of this regulation to address the unique considerations of class proceedings.[54]

Although in-person contact by a lawyer is strictly prohibited, the use of public media sources to advertise a particular investigation of pending class proceedings is permitted.[55] These forms of communication are tolerated as they are subject to third party scrutiny, while the private communications that occur between the attorney and the prospective client are not.[56]

Given the particular parameters of the *Model Rules* and lack of similar regulations in Canada, it is difficult to find applicability to the Canadian jurisprudence. Barratry is not a prohibited practice in Canada, and is an aspect of the lawyering process that is rarely discussed. In 2001, Associate Chief Justice Osborne of the Ontario Court of Appeal, as he then was, admitted in *McIntyre*, "I include myself among those who had never heard of the tort of barratry until I read the material on this motion".[57] The 1950 Report of the Royal Commission on the Revision of the Criminal Code abolished barratry as an offence.[58] Therefore, given the lack of symmetry of the rules with respect to the solicitation of clients, our American counterparts cannot

[53] Thomas Pobgee, "Solicitation of Class Action Lawsuits" (1986) 10 J Legal Prof 201 at 206.

[54] ABA Ethics Review, *supra* note 48.

[55] ABA *Model Rules of Professional Conduct*, *supra* note 50 at Rule 7.2.

[56]ABA *Model Rules of Professional Conduct*, *supra* note 50 at Rule 7.2, commentary.

[57] *McIntyre Estate v. Ontario (Attorney General)* [2002] 61 OR (3d) 257 at para 22 [*McIntyre*].

[58] *Ibid* at para 26.

provide guidance on the appropriateness of placing ethical restraints on class counsel prior to commencing a class proceeding.

Is There an Alternative?

In looking to formulate a solution, a balance must be struck between the competing interests of entrepreneurial counsel to function as regulators of societal wrongs and the interests of potential corporate defendants to maintain public image. On one hand, the public is entitled to be informed when their rights have been infringed and to seek justice accordingly, yet on the other hand, a defendant should be afforded respect in the public media forum.

The judiciary plays a key role in identifying and rectifying possible unethical conduct,[59] but as previously discussed, the stages prior to commencing a class proceeding are unique in that it is a process not governed by the Courts. This raises the question of whether there should be a screening process prior to commencing a class claim. This was one of the recommendations put forth by the OLRC over 25 years ago. A Preliminary Merits Review was proposed, which would effectively determine the substantive adequacy of the class action prior to certification.[60] After consideration of the implications that would stem from this procedural step, it was concluded that this would be relatively ineffective. Further, adding this requirement would not be within the ambit of the purpose of class proceedings legislation, which is strictly to be used as a procedural mechanism, not a precursor to trial adequacy.[61] Additional barriers placed on class counsel in commencing an action would discourage the utilization of class proceedings and

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[59] Kalajdzic, *supra* note 14 at 32.

[60] OLRC Report, *supra* note 3 at 324.

[61] Ian C. Matthews, "Preliminary Merits Review For Class Actions In Ontario: Thanks, But No Thanks!" (2010) 6 Can Class Action Rev 1 at 119.

would, in effect, deter the major policy goals of access to justice, judicial economy and behaviour modification.[62]

In looking to other alternatives, perhaps the respective law societies in the provinces who act as self-governing bodies should attempt to control or restrain the "speech" from lawyers, as these forms of public announcements can be viewed in the nature of marketing, both for the potential action itself and for the particular firm. In 2000, the CBA issued a practice directive to the respective law societies, urging the adoption of a set of recommendations pertaining to the solicitation of survivors of Aboriginal residential schools.[63] This was in response to the need protect the particularly vulnerable nature of the victims of sexual assault. Perhaps similar directives can be put in place for the initiation of public announcements concerning the investigation of potential claims. Some critics are of the opinion that the allowance of these forms of communication does not facilitate true 'advocacy' in its intended sense.[64] This is not to say that class counsel are engaging in what could be seen as defamatory conduct, but that there is a recognition of a heightened responsibility from a member of the legal profession to protect against such risks.

It can alternatively be argued that the media publicity that is attracted to a class action after it is commenced is no different or is often times more damaging to a company's public image than when class counsel advertise the investigation. However, the distinction is that this is *after* the action has been commenced and pleadings have been filed with the court disclosing a

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[62] *Ibid*.

[63] "Resolution 00-44-A", online: Canadian Bar Association <http://www.cba.org/cba /sections _abor/main/00_04_a.aspx>.

[64] *Supra* note 27.

valid cause of action. What is being called into question is the ability for counsel to use media forums as their own platform to launch potential class actions. Absolute privilege, which is the immunity from defamation, is only afforded to counsel in judicial proceedings, which are representations made in the form of in-court statements or pleadings filed.[65] Absolute privilege does not extend to representations made in anticipation of litigation, as was found to be the case in *Moseley-Williams v Hansler Industries Ltd.*, where the Court concluded that immunity does not extend to cease and desist letters sent by the defendant's counsel.[66] This begs the question of whether public investigations initiated by class counsel could be viewed in the same light.

Conclusion

As with many practical problems, it is easier to academically identify and discuss rather than craft the solution. Perhaps when addressing the ethical concerns that arise in general from the unique nature of class proceedings, the legislature or the law societies will take into consideration the issue of initiating claims and appropriately balance the interests of both the plaintiff and the defendant, while keeping in mind the important goals of class proceedings, that being access to justice, judicial economy and behaviour modification.

[65] Debra Rolph, "Is the defence of absolute privilege available for communications in advance of litigation?" *LAWPRO Magazine* (May/June 2010), online: LAWPRO < www.practicepro.ca/LAWPROMag/ AbsolutePrivilege.pdf>.

[66] [2004] OJ No 5253, 2004 Carswell Ont 5827 (OnSupCtJus.) at para 46.